CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. [redacted]. 88.

THE TOXAWAY HOTEL COMPANY

vs.

J. L. SMATHERS & COMPANY, C. C. WILLIS, ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED FEBRUARY 29, 1908.

(21,047.)

(21,047.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 644.

THE TOXAWAY HOTEL COMPANY

vs.

J. L. SMATHERS & COMPANY, C. C. WILLIS, ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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United States Circuit Court of Appeals,

FOURTH CIRCUIT.

No. 765.

THE TOXAWAY HOTEL COMPANY, APPELLANT,

versus

J. L. SMATHERS & COMPANY, C. C. WILLIS, ET AL.,

APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT ASHEVILLE.

Certificate of Question by the Circuit Court of Appeals for the Fourth Circuit, to the Supreme Court of the United States, Filed the 19th day of February, 1908.

This cause coming on for hearing before the court, after argument, it is ordered, in view of the general importance of one of the questions arising on the record, and the difference of opinion in this court as to the correct decision thereof, that that question be certified to the Supreme Court of the United States for instruction for its proper decision; and that accompanying said question shall be certified a statement from which such question can be understood, which statement and question are as follows:

QUESTION.

Whether or not the appellant, Toxaway Hotel Company, a corporation, under the facts hereinafter stated and doing the business hereinafter set forth, is subject to the provisions of Section 4, sub-section b, of the United States National Bankruptcy Act of 1898, and the amendments thereto, and liable to be adjudicated an involuntary bankrupt?

Statement of Facts.

This was an appeal duly allowed to the United States Circuit Court of Appeals for the Fourth Circuit, from an order and decree made by the District Court of the United States for the Western District of North Carolina, in bankruptcy, overruling the appellant's plea to the jurisdiction of the court, and adjudging the appellant a bankrupt.

On January 18th, 1907, a petition was filed by J. L. Smathers Company and four other creditors of the Toxaway Hotel Company alleging that said company was a corporation, engaged principally in trading and mercantile pursuits, which, for the greater portion of six months next preceding the date of filing the petition had its principal place of business at Lake Toxaway, in the County of Transylvania, North Carolina, and was indebted to the amount of $1,000 to the petitioners and other creditors, and that said company was insolvent, and that within four months preceding the filing of the petition, and while insolvent, had committed an act of bankruptcy by transferring certain leases and other property of the company to Bluthenthal & Bickart, of Atlanta, Ga., one of its creditors with intent to prefer such creditor, and praying that said corporation be adjudged a bankrupt.

Upon the service of the subpœna, said corporation, through its attorneys, entered a special appearance and filed its plea denying the power of the court to adjudge said corporation a bankrupt on the ground that the Toxaway Hotel Company was a duly chartered corporation, the principal business of which, both under its charter and as a matter of fact, was to conduct hotels; and that it was not engaged either in manufacturing, trading, mining or mercantile pursuits, and for these reasons the court was without jurisdiction as a court of bankruptcy, to adjudge said corporation a bankrupt, because it did not come under any of the classes of incorporated companies which could be adjudged bankrupt under the Act of Congress relating to bankruptcy.

Upon the filing of this plea the matter was referred to a Special Master to take testimony upon issues of fact raised by the pleadings. The Special Master proceeded upon due notice to take testimony and filed his report on the 19th of June, 1907. After argument was heard, the court made order and decree overruling the plea filed by said Toxaway Hotel Company, and at the same time adjudging said company a bankrupt.

From testimony reported by the Special Master it is ascertained that on the 17th day of May, 1905, a charter was issued in Fulton County, Georgia, incorporating J. C. Bur-

rowes and others, under the name and style of the Toxaway Hotel Company.

The business to be carried on by said corporation, as set forth in the petition for the charter, was:

"2. The object of their association is pecuniary gain for themselves and associates."

"3. The particular business which they propose to carry on will be to conduct hotels for the accommodation of the public, or individuals; to keep, manage, conduct, and carry on the business of running hotels, cottages, inns and restaurants, with their usual and necessary adjuncts, including the running of billiard and pool rooms, bowling alleys, buying and selling liquors and tobacco in all their forms, conducting and leasing news and book stands; baths of all kinds, to conduct livery stables, operating farm and fish hatcheries; to run omnibuses and transfer lines, together with all other pursuits incident to the operation of hotels."

"4. Petitioners pray the further right to purchase, own, lease or otherwise acquire, lands and buildings, and other property, with the right to dispose of the same."

"5. They further desire the right to borrow money, execute notes, bonds and other evidences of debt, and to secure the same by mortgage, deed of trust or otherwise."

The articles of incorporation granted to the Toxaway Hotel Company all the rights and privileges as prayed for in the petition. Said company was duly organized under the charter, and J. C. Burrowes was elected president and M. L. Bickart, secretary.

In March, 1905, said corporation began conducting hotels; said hotels being:

The Aethelwold, and the Franklin, at Brevard, N. C.,
The Toxaway Inn, at Lake Toxaway, N. C.,
The Sapphire Inn, at Sapphire, N. C.,
The Fairfield Inn, at Lake Fairfield, and
The Lodge, on Mt. Toxaway.

All these hotels except the Aethelwold, a small hotel in the town of Brevard, were resort hotels, situated in the Mountains of North Carolina, and had an aggregate capacity of about 750 guests. Said corporation conducted these hotels until about the first of October, 1906, except the Aethelwold, which it ceased to conduct on October 1st, 1905, and the Sapphire Inn which was burned about June 1st, 1906.

That the business done by the corporation at these hotels during the first season from March to October, 1905, as shown by the receipts, amounted to $119,171.36; and that done during the second season, from January 1st, to October 1st, 1906, as shown by the receipts, amounted to $127,136.01.

That during 1905, and until June, 1906, the said corporation did no other business than conducting hotels, excepting the cultivation of a small farm connected with one of the hotels, for the purpose of supplying vegetables and garden truck.

That in June, 1906, said corporation acquired and began conducting two country stores,—one located at Toxaway Inn, and the other at Lake Sapphire, and Fairfield Inn. In these stores were kept stocks of general merchandise, such as is usually carried in country stores, to-wit: dry goods, groceries, notions, hats, caps, clothing, a small assortment of hardware, flour, meal, meat, feed, etc., the average value of each stock being from three to four thousand dollars.

The said hotels were located in a thinly settled section of the mountains of North Carolina, quite a distance from any town; that the stores furnished the hotels from their stocks, and, also, with such produce and other things necessary for the hotels as came into the stores, and they, also, sold goods and merchandise to people generally; and, also, bought and sold some tan bark. That from two thirds to three fourths of the goods handled by these stores went as supplies to the hotels on orders of the stewards of the hotels and the remainder were sold generally, principally to employees of the corporation and also to the people at large. That the business of the hotels and the stores was kept without separation in one set of books. The corporation, also, kept a bar in the Toxaway Inn, at which liquors were sold exclusively to the guests, and had a number of boats and launches on the lakes at Toxaway Inn and at Fairfield which it hired to patrons when called for.

That said corporation employed about 130 persons in and about the hotels, and four persons in and about the stores.

That the said hotels were closed for the season in October, 1906, but possession thereof was not surrendered by said corporation until about April 20th, 1907.

That on November 13th, 1906, the said corporation executed to R. A. Jacobs a bill of sale which was as follows:

North Carolina, }
Transylvania County. }

Know all men by these presents, that the Toxaway Hotel Company, a corporation, chartered, organized and doing business under and by virtue of the laws of the State of Georgia, party of

the first part, in pursuance of a resolution heretofore adopted by its Board of Directors, to that effect, and theretofore duly authorized by a meeting of all of its stockholders, has, this the 13th day of November, 1906, in consideration of the sum of seven thousand ($7,000.00) dollars, paid to it by R. A. Jacobs, of Transylvania County, North Carolina, party of the second part, bargained, sold and delivered to said R. A. Jacobs the following personal property:

All of the goods, merchandise and supplies consisting of dry goods, clothing, hats, caps, boots, shoes, groceries, feed stuffs, drugs, and such other goods and merchandise as are usually carried in a country store, together with all furniture and fixtures now contained in one store room and warehouse used in connection therewith, at Lake Toxaway, in the County of Transylvania, and State of North Carolina; and certain live stock consisting of two (2) horses, five (5) mules, four (4) oxen, five (5) draft wagons and one (1) baggage wagon, and all harness used in connection with said wagons, these being all of the horses, mules, oxen, wagons and harness owned by said Toxaway Hotel Company, at Lake Toxaway, and now being in Transylvania County, North Carolina; six (6) milch cows and one (1) bull, now at Lake Toxaway, in Transylvania County, North Carolina; and all of the goods, merchandise and suppiles consisting of dry goods, clothing hats, caps, boots, shoes, groceries, feed stuffs, drugs and such other goods and merchandise as are usually carried in a country store, together with all furniture and fixtures now contained in a certain store room at Sapphire, in the County of Jackson, and State of North Carolina, and warehouse used in connection therewith, and now belonging to the Toxaway Hotel Company; all lumber, wagon material of all descriptions, iron, steel, and all other material, tools and apparatus used in connection therewith and now contained in a certain blacksmith shop at Sapphire, Jackson County, North Carolina; and certain other materials, tools, and apparatus recently removed from said blacksmith shop and now located at Lake Toxaway, in the County of Transylvania, N. C.; and twenty eight (28) milch cows and one (1) bull, at Fairfield Farm, in Jackson County, North Carolina, these being all the milch cows and bulls now owned by the said Toxaway Hotel Company and situated in Jackson and Transylvania Counties, North Carolina; and, also, all the hogs, and pigs belonging to said The Toxaway Hotel Company and now in Jackson and Transylvania Counties, North Carolina.

To have and to hold all of said property unto the said R. A. Jacobs, his executor, administrators and assigns forever.

And the said Toxaway Hotel Company hereby warrants all of said property to be free from any incumbrance or lien

of any kind, and further warrants the title hereby given to be good and indefeasible.

In witness whereof the said Toxaway Hotel Company has caused these presents to be signed by its name by John C. Burrowes, its president, and to be attested by its secretary this the 13th day of November, 1906.

THE TOXAWAY HOTEL COMPANY,
By JOHN C. BURROWES, President.

Attest: M. L. BICKART, Secretary.

Witness our hands this 19th day of February, 1908.

MELVILLE W. FULLER,
Chief Justice of the United States allotted to the Fourth Circuit.

THOS. J. MORRIS,
U. S. District Judge, District of Maryland.

WM. H. BRAWLEY,
U. S. District Judge, District of South Carolina.

Clerk's Certificate.

UNITED STATES OF AMERICA:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the aforegoing is a true copy of the original certificate of the question or proposition of law to the Supreme Court of the United States in the therein entitled cause filed and now remaining of record in the said United States Circuit Court of Appeals.

{Seal of Court}

In testimony whereof I hereto set my hand and affix the seal of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 24th day of February, A. D., 1908.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Circuit.

FILED.
OCT 2 1909
JAMES H. McKENNEY,
CLERK.

(21047)

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1909

(No. 88)

THE TOXAWAY HOTEL COMPANY

vs.

J. L. SMATHERS & COMPANY, C. C. WILLIS, ET AL.

Brief of

T. F. DAVIDSON LOUIS M. BOURNE
HAYWOOD PARKER JOHN M. SLATON
BEN Z. PHILLIPS

Counsel for the Toxaway Hotel Company.

ASHEVILLE PTG. & ENG. CO., ASHEVILLE, N. C.

IN THE

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OCTOBER TERM, 1909

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vs.

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On a Certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE.

On January 18th, 1907, a petition was filed by J. L. Smathers Company and four other creditors of the Toxaway Hotel Company alleging that said Company was a corporation, engaged principally in trading and mercantile pursuits, which, for the greater portion of six months next preceding the date of filing the petition had its principal place of business at Lake Toxaway, in the County of Transylvania, North Carolina, and was indebted to the amount of $1,000 to the petitioners and other creditors, and that said Company was insolvent, and that within four months preceding the filing of the petition, and while insolvent, had committed an act of bankruptcy by transferring certain leases and other property

of the Company to Bluthenthal & Bickart, of Atlanta, Ga., one of its creditors, with intent to prefer such creditor, and praying that said corporation be adjudged a bankrupt.

Upon the service of the subpoena, said corporation, through its attorneys, entered a special appearance and filed its plea, denying the power of the Court to adjudge said corporation a bankrupt on the ground that the Toxaway Hotel Company was a duly chartered corporation, the principal business of which, both under its charter and as a matter of fact, was to conduct hotels; and that it was not engaged either in manufacturing, trading, mining or mercantile pursuits, and for these reasons the Court was without jurisdiction as a court of bankruptcy, to adjudge said corporation a bankrupt, because it did not come under any of the classes of incorporated companies which could be adjudged bankrupt under the Act of Congress relating to bankruptcy.

Upon the filing of this plea the matter was referred to a Special Master to take testimony upon issues of fact raised by the pleadings. The Special Master proceeded upon due notice to take testimony and filed his report on the 19th of June, 1907. After argument was heard, the Court made order and decree overruling the plea filed by said Toxaway Hotel Company, and at the same time adjudging said company a bankrupt.

From testimony reported by the Special Master, it is ascertained that on the 17th day of May, 1905, a charter was issued in Fulton County, Georgia, incorporating J. C. Burrowes and others, under the name and style of the Toxaway Hotel Company.

The business to be carried on by said corporation, as set forth in the petition for the charter, was:

> "2. The object of the association is pecuniary gain for themselves and associates."
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> "3. The particular business which they propose

to carry on will be to conduct hotels for the accommodation of the public, or individuals; to keep, manage, conduct, and carry on the business of running hotels, cottages, inns and restaurants, with their usual and necessary adjuncts, including the running of billiard and pool rooms, bowling alleys, buying and selling liquors and tobacco in all their forms, conducting and leasing news and book stands; baths of all kinds, to conduct livery stables, operating farm and fish hatcheries; to run omnibuses and transfer lines, together with all other pursuits incident to the operation of hotels."

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The said hotels were located in a thinly settled section of the mountains of North Carolina, quite a distance from any town; that the stores furnished the hotels from their stocks, and, also, with such produce and other things necessary for the hotels as came into the stores, and they, also, sold goods and merchandise to people generally, principally employees of the company; and, also, bought and sold some tan bark. That from two-thirds to three-fourths of the goods handled by these stores went as supplies to the hotels on orders of the stewards of the hotels and the remainder were sold generally, principally to employees of the corporation, and also to the people at large. That the business of the hotels and the stores was kept without separation in one set of books. The corporation, also, kept a bar in the Toxaway Inn, at which

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That said corporation employed about 130 persons in and out the hotels, and four persons in and about the stores.

That the said hotels were closed for the season in October, 06, but possession thereof was not surrendered by said corration until about April 20th, 1907.

That on November 13th, 1906, said corporation executed to A. Jacobs a bill of sale whereby, for the consideration of ,000, it conveyed to him all of the stock of goods in said two res and, also, two horses, five mules, six wagons and harss connected therewith, and forty head of cattle and, also, ls and material in a blacksmith shop situated near one of stores.

From the order and decree made by the District Court of United States for the Western District of North Carolina, bankruptcy, overruling the appellants' plea to the jurisdicn of the Court, and adjudging the appellant a bankrupt, an peal was taken and duly allowed to the United States Cirt Court of Appeals for the Fourth Circuit.

When the cause came on for hearing before the Circuit urt of Appeals, after an argument, that Court, in view of general importance of one of the questions arising on record and the difference of opinion of the Court as to correct decision thereof, ordered that the question be tified to the Supreme Court of the United States for inuction for its proper decision.

QUESTION.

Whether or not the Toxaway Hotel Company, a corporation, der the facts herein stated and doing the business herein forth, is subject to the provisions of Section 4, Sub-section of the United States National Bankruptcy Act of 1898, l the amendments thereto, and liable to be adjudicated an oluntary bankrupt?

ARGUMENT.

The Toxaway Hotel Company insists that the facts show that it was a corporation whose principal business, both under its charter and as a matter of fact, was to conduct hotels; and that conducting hotels is neither a manufacturing, trading, printing, publishing, mining, or mercantile pursuit, and therefore it is not subject to the bankruptcy law, because Section 4, Sub-section b, of that act restricts its application to corporations principally engaged in one of the pursuits enumerated.

The present bankruptcy law has restricted the corporations against whom proceedings can be taken, and many corporations which were in the purview of the law of 1867 are not amenable to the present law.

The first case after the passage of the bankrupt act of 1898 in which a Court was called upon to pass on the question of what corporations were amenable to said act was the case of Re San Gabriel Sanitorium Co., 95 Fed. 271, decided by the United States District Court of the Southern District of California, in June, 1899. That corporation conducted a sanitorium which supplied lodging, board and certain medical treatment for consideration. The Court was evidently influenced by the decisions under the bankruptcy act of 1867, and seems to have been inadvertent to the difference between the language of that act and that of the present law in describing the classes of corporations which could be declared bankrupts. It decided the Sanitorium Company subject to the bankruptcy law. This case has never been followed as an authority, or even cited with approval; on the contrary, it has been disapproved repeatedly by many District Courts and by several United States Circuit Courts of Appeals.

The next case in which the question was presented was *Re Cameron Town Mutual F. L. & W. Insurance Company*, 96 Fed. 756, in the U. S. District Court of the Western District of Missouri, decided also in June, 1899. There the Court

eld that a mutual insurance company was not amenable to he present bankrupt law, not being a corporation principally ngaged in a mercantile pursuit; and Phillips, Judge, in the pinion, says:

> "It is conceded by the counsel for the petitioners that unless the company is engaged principally in mercantile pursuits the petition should be dismissed. It is to be observed, in the first place, that the present bankruptcy act, in this respect, is radically different from the bankruptcy act of 1867. Section 37 of that act provided that 'the provisions of this act shall apply to all moneyed, business or commercial corporations, and joint stock companies.' It may be conceded for the purpose of this case that the Cameron Town Mutual F. L. & W. Insurance Company might have been proceeded against in bankruptcy under the act of 1867 as a moneyed, business corporation; but the provisions of the present bankruptcy act in this particular are much more restrictive, and are limited expressly to corporations engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits."

And the Court decided that the corporation did not come ithin the classes enumerated in the present act. This case s never been disapproved, but has been cited with approval many District Courts and by several U. S. Circuit Courts Appeals.

A few months afterward, in January, 1900, the U. S. Dis- et Court for the Southern District of New York passed on is question in the case of *Re New York & Westchester Water* ., 3 Am. Bankr. Rep. 508. In his opinion, Judge Brown ys:

> "I am of opinion that this water company is not within the provisions of the bankrupt act, because not 'engaged principally in either trading or mercan-

tile pursuits,' in the sense in which I think those words are used. The question depends entirely upon the proper construction to be given to those words, since there are plainly no other words in the present act that could include an incorporated water company like this.

"The act of 1898 is much more limited in its application to corporations than the act of 1867. By the latter act it was declared (Section 5122, Rev. St.), to 'apply to all moneyed business or commercial corporations and joint stock companies.' The present act is restricted to corporations 'engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits.'

"The intention of Congress greatly to restrict the application of the present act appears manifest, not only from comparison of the phraseology of the two acts, but also from the report of the congressional conference committee upon this point, showing that at least railroad and transportation corporations and banks were intended to be omitted and left to be dealt with under the state laws. 31 Cong. Rec., p. 6427, June 28, 1898. In the recent case of *In re Cameron Town Mut. Fire, Lightning and Windstorms Ins. Co. (D. C.)*, 96 Fed. 756, it was accordingly held that the present act does not apply to a mutual insurance company, and the petition in that case was dismissed. On the point here considered, Phillips, Judge, observes: 'Can it be said that a company "organized for the sole purpose of mutally insuring the property of the members and for the purpose of paying any loss incurred by any member therof by assessment" is principally engaged in a mercantile pursuit? When the legislature changed the statute from 'moneyed, business or commercial corporations' to the language 'principally engaged in mercantile pursuits,' it is to be presumed it was done for a purpose. The word 'mercantile,' in its ordinary acceptation, pertains to the business of merchants, and has 'to do with trade, or the buying and selling of commodities.' A merchant is one who

traffics, or who buys and sells goods or commodities. * * * The term 'mercantile pursuit' necessarily carries with it the idea of traffic, the buying of something from another or the selling of something to another, and is allied to trade. This concern has nothing in its business of the character of 'mercantile pursuit.' 96 Fed. 757, 758.

"The case of a water company, like this, obtaining by purchase about two-fifths of the supply which it furnishes to its customers, is not so clearly excluded as a mutual insurance company. But in each case as it arises the limitations imposed by the act must be carefully observed. No such corporation can be subjected to the operation of the bankrupt law, nor can the court acquire jurisdiction over it, unless it is found to be 'engaged principally in trading or mercantile pursuits.' These words must be interpreted in the sense in which they are commonly used and received, and not in any strained or unnatural sense for the purpose of including or of excluding particular corporations.

"'In Bouv. Law Dict. a trader is defined as "one who makes it his business to buy merchandise or goods and chattels and to sell the same for the purpose of making a profit." Black, Law Dict., says: "One whose business is to buy and sell merchandise or any class of goods deriving a profit from his dealings"; and the weight of authority seems to be, that the proper description of the business of a trader includes both buying and selling, either goods or merchandise, or other goods ordinarily the subject of traffic. Per Lord Ellenborough in *Sutton v. Weeley*, 7 East, 422; Thompson, C. J., in *Wakeman v. Hoyt*, 28 Fed. Cas. 1351; Lowell, J., in *re Chandler*, 4 N. B. R. 213, 5 Fed. Cas. 447; *In re Smith*, 2 Low. 69, 22 Fed. Cas. 395; *Love v. Love*, 16 Fed. Cas. 999.

"'The words "mercantile pursuits" may have little broader signification than "trading." "Mercantile" is defined by the Century Dictionary as "having to do with trade or commerce; or of pertaining to mer-

chants, or the traffic carried on by merchants; trading; commercial." It signifies for the most part the same thing as the word "trading"; and by "mercantile pursuits" is meant the buying and selling of goods or merchandise, or dealing in the purchase and sale of commodities, and that, too, not occasionally or incidentally, but habitually as a business. *Norris v. Com.*, 27 Pa. St. 494; *Com. v. Natural Gas Co.*, 32 Pittsb. Leg. J. 310.

"'Selling merely the natural products of one's land, it has been held, does not constitute trading, or a mercantile pursuit, even though some yearly purchases may be made by the seller in order to keep up his regular supply. *In re Woods*, 7 N. B. R., 128 Fed. Cas. No. 17, 990; *Port v. Turton*, 2 Wils. 69; *in re Cleland*, 2 Ch. App. 466; *ex parte Gallimore*, 2 Rose, 424. These terms are restricted also to dealings in merchandise, goods or chattels, the ordinary subjects of commerce; so that a railroad contractor, or a speculator in stocks, whether on his own account or as broker, is not deemed a trader or merchant. *In re Smith*, 2 Low. 69, 22 Fed. Cas. 395; *in re Marston*, 5 Ben. 313, 16 Fed. Cas. 857; *in re Woodward*, 8 Ben. 563, 30 Fed. Cas. 542; *in re Moss*, 19 N. B. R. 132, 17 Fed. Cas. 901, per Choate, J. It has also been held that incidental purchases or sales by a person not otherwise a trader, will not make him such. Lord Eldon, *exparte Gallimore*, 2 Rose, 424; *Patten v. Brown*, 7 Taunt. 409; *in re Duff* (*D. C.*), 4 Fed. 519, per Choate, J.; *in re Kimball* (*C. C.*), 7 Fed. 461, per Lowell, J.

"'No doubt the powers of a corporation are to be determined by its charter and by the statutes applicable to it. The amendment of the charter of this corporation authorized it "to buy, sell, use and deal in water for power, manufacturing and hydraulic purposes." As above stated, however, the evidence is that it did not furnish water for these purposes; and under the bankrupt act the question is, not how extensive the company's powers may be, but in what pursuits the corporation is in fact principally en-

gaged, and whether these pursuits are principally trading or mercantile.

"'In view of the above definitions and precedents, it seems to me a strained and unnatural use of terms to describe the ordinary business of a water supply company as a "trading or mercantile pursuit." In common parlance, I think such a business would never be so described; and if only those corporations are subject to the bankrupt act that are engaged in "trading or mercantile pursuits" in the commonly received meaning of those words, I do not see how water supply companies can fairly be held to be within the act. In the case of *First Nat. Bank v. Council Bluffs City Waterworks Co.*, 56 Hun, 412, 9 N. Y. Supp. 859, the Court observes: "This water company was not a trading or banking corporation."'"

This case was affirmed on appeal by the U. S. Circuit Court of Appeals of the Second Circuit, *sub. nom. In re Morris*, 102 Fed. 1004, on the opinion of the Court below.

This case, together with *re Cameron Town Mutual F. L. & W. Ins. Co., supra*, may be considered the two leading cases on the question, as they have been cited more generally and more frequently than any other cases.

Following the reasoning of these cases, the U. S. District Courts in the following named states and territory have given a strict interpretation to the language of the act, and in the twenty-six cases cited have held the corporations under consideration not amenable to the bankruptcy law:

Massachuetts:

Re H. J. Quimby Freight F. Co., 10 Am. Bankr. Rep., 424.

New York:

Re Rollins G. & S. Mining Co., 4 Am. Bankr. Rep., 508.

Re N. Y. Building & Loan Co., 127 Fed. Rep., 471.

Re N. Y. & N. J. Ice Lines, 14 Am. Bankr. Rep., 61.

New Jersey:

Re Tontine Surety Co., 8 Am. Bankr. Rep., 421.

Pennsylvania:

Re Oriental Society, 5 Am. Bankr. Rep., 219.

Re Woodside Coal Co., 5 Am. Bankr. Rep., 186.

Re Keystone Coal Co, 6 Am. Bankr. Rep., 377.

Re Phil & Lewes Co., 7 Am. Bankr. Rep., 707.

First Nat. Bank v. Wyoming, 14 Am. Bankr. Rep., 448.

Gallagher v. Delancey Stables, 19 Am. Bankr. Rep., 801.

Virginia:

Re McNichol Const. Co., 14 Am. Bankr. Rep., 188.

Georgia:

Re Fulton Club, 113 Fed., 997.

Alabama:

McNamara v. Helena Coal Co., 5 Am. Bankr. Rep., 48.

Texas:

Re Bay City Irrigation Co., 14 Am. Bankr. Rep., 370.

Missouri:

Re Cameron Town Insurance Co., 2 Am. Bankr. Rep., 372.

Re Chicago & Joplin Co., 13 Am. Bankr. Rep., 712.

Illinois:

Re Snyder & Johnson Co., 13 Am. Bankr. Rep., 325.

Michigan:

Re Toledo Cement Co., 19 Am. Bankr. Rep., 117.

Wisconsin:

Re White Star aLundry Co., 9 Am. Baknr. Rep. 30.

Colorado:

Re Elk Park M. & Mining Co., 4 Am. Bankr. Rep., 131.

Re Chesapeake Fish & Oyster Co., 7 Am. Bankr. Rep., 173.

Arizona:

Re Min. & Ar. Construction Co., 60 Pac. Rep., 881.

California:

Re Pacific Warehouse Co., 10 Am. Bankr. Rep., 474.

Herron Co. v. Superior Court, 68 Pac. Rep., 814.

The Circuit Court of Appeals in eight circuits have passed on the question in the following eighteen cases, and all, with one exception, (that for the Eighth Circuit), have given a similar interpretation to the language of the act.

First Circuit:

Philpot v. O'Brien, 11 Am. Bankr. Rep., 205.

White Mountain Paper Co., 127 Fed., 643.

Burdick v. Dillon, 144 Fed., 737.

Second Circuit:

Re Morris, 102 Fed., 1004.

Re N. Y. & N. J. Ice Co., 16 Am. Bankr. Aep. 832.

Re Kingston Realty Co., 19 Am. Bankr. Rep., 845.

Altonwood Co. v. Gwynne, 20 Am. Bankr. Rep., 31.

Re Wentworth Lunch Co., 20 Am. Bankr. Rep., 29.

Re Marine C. & D. Dock Co., 130 Fed., 446.

Third Circuit:

Re Zugella & Int. M. Agency, 16 Am. Bankr. Rep., 67.

Hall & Kaul v. Friday, 19 Am. Bankr. Rep., 841.

Fourth Circuit:

Butt v. McNichol Const. Co., 14 Am. Bankr. Rep., 188.

Sixth Circuit:

Columbia Iron W. v. Nat. Lead Co., 62 C. C. A., 99.

U. S. Hotel Co. v. Niles, 13 Am. Bankr. Rep., 403.
(Reversing the District Court, and holding that conducting a hotel is not a trading pursuit.)

Seventh Circuit:

Re Surety, Guaranty Trust Co., 9 Am. Bankr. Rep., 129.

Re Parmlee Library, 9 Am. Bankr. Rep., 568.

Re E. T. Hill Co., 17 Am. Bankr. Rep., 517.

Eighth Circuit:

Re First Na. Bank of Belle Fouche, 152 Fed., 64.

A careful analysis of the cases in which corporations have been held amenable to the bankrutcy law will show that none of the courts have taken a different view of the law, except only in the one case from the Eighth Circuit, and in the two cases, *San Gabriel Sanitorium, supra,* and *Re Morton Boarding Stables,* 5 Am. Bankr. Rep., 763, decided by District Courts, and both of which have been repeatedly disapproved; with these exceptions, the facts in every other case showed the principal business done by the corporation came within one of the enumerated classes. A good illustration of this is the *Barton Hotel Co.*, 12 Am. Bankr. Rep., 335, from the Supreme Court of the District of Columbia, in which Judge Stafford said: "The recitals which have just been made from the pleadings, when taken together, leave some doubt as to the precise character of the business in which the bankrupt company was principally engaged at the time of the filing of the petition. I am not prepared to hold that a hotel business, conducted in the ordinary way, with only such sales of food and drink and cigars as is ordinarily incident to the hotel business, is a trading and mercantile business within the meaning of the Act of Congress. The principal and distinct features of the hotel business are not the purchase and sale of commodities, but the furnishing of the traveling public with a temporary home with bed and board and service and the ordinary comforts of an abiding place. It is certainly a great stretch of language which would enable us to speak of such a business as a trading or mercantile business. On the other hand, I am not prepared to hold that a corporation with such a charter as that possessed by this bankrupt company might not, under the manner and guise of a hotel company, and even while engaged to some extent in the legitimate business of a hotel company, so conduct its business as to fall within the terms of the act and be properly characterized as principally engaged in trading and mercantile business. It is said to have some seventy rooms, more than enough to entitle it,

under the laws of the District of Columbia, to a bar license. It appears to have been engaged in the saloon business and in the sale of tobacco and cigars, not only to its guests, but to the public generally. During this summer and during other summers it seems that its business had been restricted to the business of a saloon and the rental of its room. It is evident that the facts may be conceived to be such as to show the business of the company to be largely or almost entirely restricted to the business carried on in the saloon. If it should come to that, I think it should be held that the business of buying liquors and tobacco and cigars at wholesale to be retailed from the counter in the saloon is a trading and mercantile business; that a corporation properly engaged in that business is liable to be adjudged a bankrupt. My conclusion is that a question of fact is involved which requires the service of a Referee to hear the evidence and report to this Court the circumstances which become material in following the line of this opinion. If the parties favoring the adjudication are advised that the facts are such to bring the bankrupt company within the rule as herein indicated, a reference will be ordered upon their motion, otherwise the corporation will be treated as engaged in the ordinary hotel business strictly and the petition dismissed."

A referee was appointed, who evidently found that the principal business of the corporation was done in its bar, as it was adjudged a bankrupt.

During the five years from the passage of the bankrupt act in 1898 to 1903 there were eighteen decisions on the question of whether the corporations under investigation came within the classes enumerated in the bankruptcy act. In two cases (*San Gabriel Sanitorium Co., supra*, and *Re Morton Boarding Stables, supra*), it was decided the corporations were amenable; and both cases have been repeatedly disapproved; in another case (*Re Mutal Mercantile Agency*, 111 Fed., 152), the Court decided that the principal business of the corporation was printing and selling a book, and hence it was amenable, as

printing corporations are specifically named; in one other case (*Re Tecopa Min. & Smelting Co.*, 110 Fed., 120), the Court held that smelting ore was a manufacturing process, and hence the corporation was amenable, as manufacturing corporations are specifically named. In the fourteen other decisions, *Re Cameron Town Mutual F. L. & W. Ins. Co., Re N. Y. & W. Water Co., Re Elk Park M. & M. Co., Re Rollins S. M. Co., Re Chicago Joplin Co., Re Oriental Society., Re Woodside Coal Co., Re Keystone Coal Co., Re Chesapeake Oyster & Fish Co., Re Fulton Club, Re Philadelphia & Lewis Transp. Co., Re Tonine Surety Co., Re White Star Laundry Co., Re Surety & Guaranty Co., various other corporations* were held not to be amendable, as they did not clearly come within either of the classes enumerated by the act.

After this very general discussion of the question by the Courts of nine different Districts and one Circuit, in which it was constantly reiterated that Congress intended by the act of 1898 to restrict the corporations amenable to bankruptcy within very narrow limits, Congress in 1903 amended the act by inserting the word 'mining," thus including another class of corporations amenable to bankruptcy.

The committee on the judiciary of the House, in reporting back this bill amending the bankruptcy law, with recommendations that it pass, among other things, said:

> "There have been laid before the committee resolutions and communications from more than twenty thousand manufacturing and producing industries, merchants, wholesale and retail, credit men's and other business associations, lawyers, judges and business men generally, representing wholesale and retail dealers, emphatically approving the amendments suggested by this bill. Of all communications received on the subject, less than ten per cent. are opposed to the bankruptcy law, and these, in the main, place their opposition on the ground of the defects of the law sought to be remedied, and which will be reme-

died if these amendments are adopted. These communications are not the result of concerted action for the retention of the law, but are the result of a desire on the part of the judiciary committee to fully ascertain the sentiment of the country on the question of the retention or repeal of the law. Near the close of the Fifty-sixth Congress the chairman of the committee of the judiciary sent out something like fifteen thousand inquiries indiscriminately throughout the United States, addressed to all business interests, wholesale and retail, merchants, lawyers, judges, etc., asking their opinion of the law and the advisability of its retention, and, also, asking their approval or disapproval of the amendments proposed and which amendments are, in substance, those reported by the committee. There was no selection except to direct inquiries to the leading business houses, wholesale and retail, and the leading lawyers and business men of the country. It is conclusievly proved that the business interests and the people of the United States approve and demand the retention of the bankruptcy law and, also, desire these amendments, which are in the interests of honest dealing. The amendments proposed are not numerous, but are such as experience has demonstrated to be essential." * * * "The next amendment simply provides that * * * and adds mining corporations to those now covered by the law.' *Report No. 1698 pages 1 and 2, Fifty-Seventh Congress, first session.* And in the analysis of the amendment the same report, on page 5, says:

"The second is made necessary by the uniform holdings of the Courts that mining corporations, which are of primary importance in some parts of the country, are not among those now enumerated in section 4.

It is noted that Congress did not so amend as to include water companies, insurance companies, theatrical companies, restaurant companies, saloon companies, social clubs, carrier companies, companies buying and selling stocks and bonds, or

laundry companies, all of which had been decided not to be within the classes enumerated by the act, and therefore not amenable to bankruptcy; and this, too, after the very general circulation and discussion of the proposed amendments as shown above by the report of the judiciary committee. It is evident from this that the Courts had correctly construed the intent of Congress. On this point Judge Lowell, in *Re H. J. Quimby Freight Forwarding Co., supra*, decided in February, 1903, says:

> "Bearing in mind that the act of 1908 was intended to exclude from bankruptcy some corporations susceptible of bankruptcy under the act of 1867, and that trading is a technical word, this respondent cannot be held to have been principally engaged in trading. Mining comes much nearer to trading than does the business of the respondent, but a mining company has generally been held to be excluded from the scope of the present Bankrupt act. * * * This interpretation of the act is rather confirmed by the amendment just adopted by Congress. Mining companies are there brought within the act, not by the use of broad general language, but by the addition of 'mining" to the 'pursuits' mentioned in the original act. *Expressio unius est exclusio alterius.* The positive inclusion of mining companies, and mining companies alone, indicates a recognition by Congress that the words 'trading' and 'mercantile' in the original act were not intended to be the equivalent of 'monied' business or commercial' in the act of 1867. The decided cases are to the same general effect. * * *While this Court may think it advisable that corporations like the one here in question should be brought within the scope of the bankruptcy act, it must be guided by what Congress has said, and not by its own view of public policy."

The U. S. Circuit Court of Appeals for the Fourth Circuit, in *Butt v. McNichol Const. Co., supra,* has recently spoken on this point, and Judge Pritchard, rendering the opinion, cites with approval Hughes on Federal Procedure as follows:

> "As to the corporations against whom involuntary proceedings may be taken, the policy of the present law is very different from that of the act of March 2, 1867. That act allowed the proceedings against all money, business and commercial corporations and joint stock companies. The language of the present act, as seen above, is entirely different, and therefore the decisions construing the old act must be but cautiously used in construing the present one. The intent of Congress evidently was to limit very largely the corporations against whom such proceedings can be taken, probably for the reason that other remedies for the liquidation of insolvent corporations are abundant, and the further reason that a bankrupt law is not as necessary to a corporation as to an individual. In view of the patent intent of Congress to limit the range of the bankrupt act as to corporations, it would seem the duty of the Courts to construe the language of the act strictly in this respect, though this has not always been done. *In re New York Water Co.,* 98 Fed., 711."

And further on in the opinion Judge Pritchard says:

> "It is contended by the petitioner that there is no reason why a construction company should not be subject to the provisions of the bankrupt law; that if the law is not so construed as to include this class of corporations, great injustice may be done by permitting such companies to prefer certain of their creditors to the exclusion of others. While such may be true, the Court is not in a position to remedy the evil of which the petitioners complain, in-asmuch as it has no power to alter, amend or change existing law. We can only apply the law to such cases as are contemplated by the statute. Congress is the only body that has the power to enact laws for the purpose of adjusting any inequalities that may exist, and until

> such action by that body can be secured, the Courts are powerless to interfere."

That these decisions of the Courts have correctly construed the intent of Congress may be seen from the reports of the committees and the proceedings terminating in the enactment of the bankruptcy law, which may be properly noticed in seeking such intent.

United States v. Trans-Missouri Freight Asso., 166 U. S., 360, 41 L. Ed. 1034.

For many years what is known as the Torrey Bankrupt Bill was pending in Congress. As to who could be adjudged bankrupts, that bill provided:

> "Sec. 44. * * * Any person whose debts amount to $500 or over if adjudged an involuntary bankrupt by a fair and impartial trial, shall be entitled to the benefits of this act, except a national bank, a person engaged chiefly in farming or the tillage of the soil, or wage earners."

Section 1, in defining terms, had said, "'persons' shall include corporations, officers, partnerships, and women."

In 1897 the Senate passed Senator Nelson's substitute for this Torrey bill, which had been there pending for several terms. The bill passed provided:

> "Sec. 41.
>
> "(b) Any person (firm or corporation), owing debts, if adjudged an involuntary bankrupt on an impartial trial, shall be subject to the provisions of this act, except (1) national banks; (2) a person engaged solely in farming or the tillage of the soil; or (3) a wage earner." (*Cong. Rec.*, Vol. 30, p. 606.)

Senator Lindsey, in presenting to the Senate the report of the committee on this substitute, said: "Bankruptcy proceedings may be commenced by creditors under careful restrictions against a person, firm or corporation concerning

whom it is alleged that an act of bankruptcy has been committed, except national banks, farmers and wage earners. There is a law now in force for the control and regulation of national banks, and it was thought best not to interfere with that law." (*Cong. Rec.*, Vol. 30, p. 602.)

The House failed to agree to the Senate bill, but proposed, on February 19, 1898, a substitute therefor, which was practically the old Torrey bill. (*Cong. Rec.*, Vol. 31, p. 1779.)

Up to this point it would seem that Congress had intended to make all corporations except national banks amenable to the law. In the debate in the House on February 19, 1898, on this last mentioned substitute, Mr. Bodine said:

> "It applies to all persons except farmers, and all corporations except national banks, and in its exceptions is as illogical, unique and partial as it is severe and drastic in its application to other persons and corporations. * * * It may be that there is a certain class of corporations that are as appropriately made subject to its provisions as are natural persons. I refer to those engaged in mining, manufacturing, merchandising, trading and the buying and selling of property of any kind and, in fine, engaged in any business of the same kind as that usually carried on by individuals. But this bill goes much further than this. It embraces insurance companies, both fire and life, stock, mutual, assessment or benevolent; it embraces building and loan associations, trust companies, savings banks and all other state banks. Now, in nearly every state in the union there are chapters on chapters of the statutes regulating to the smallest minutia the proceedings in case of the insolvency of any of those classes or corporations." (*Cong. Rec.*, Vol. 31, p. 1939.)

This extract is quoted for the reason that it is the first ggestion that the law should be restricted in its application corporations, the view which finally prevailed, as can be

seen by the reports of committees and the law itself.

The next step in the progress of the bill is well told by Mr. Henderson, in presenting the statement accompany the conference report to the House, who said:

> "It may be well to state the general history or status of the bill in this Congress. At the extraordinary session of last year the Senate passed a bankruptcy bill. On the 19th of February of the present year the House passed a bill as a substitute for the Senate bill and asked for a conference. The Senate disagreed to the amendment or substitute of the House and agreed to the conference. For fully three months and a half the conferees, on the part of the two Houses, have been steadily at work—I say steadily in the sense of working as continuously as the circumstances would possibly admit—trying to reach an agreement. We finally, a few days ago, reached an agreement.
>
> "In justice to my associates on the conference committee, Mr. Speaker, I desire here to make public acknowledgment of the untiring energy and able service of my colleague from the State of New York (Mr. Ray). We appointed from the conference committee a sub-committee, consisting of the Senator from Minnesota (Mr. Nelson), one of the conferees on the part of the Senate, and Judge Ray, of New York, to take into consideration the matters involved and in dispute in connection with the bill now before the House.
>
> "This sub-committee was appointed after many gatherings of full conference and a pretty thorough consideration of the main issues. The work of the sub-committee was, of course, to be tentative and to be submitted to their conferees before anything was considered as having been agreed to by the sub-committee. The patriotism, the faithful, painstaking and constant industry, and the energy of these two gentlemen on the sub-committee, I feel it to be my duty, here and now, to acknowledge in justice to them and for the information of the country.

"Finally, after they had gone over the various parts of the bill and had come to the parts where they thought there could be an agreement, they respectively referred the questions at issue to their co-conferees, and after consideration, with some suggestions, modifications and changes, to make a long story short, their associates agreed to the recommendations submitted by the sub-committee. We then met again in full conference, fully discussed the various items at issue and, with some slight additional changes in the conference, reached a complete agreement, which is now submitted to the House for its action.

"The Senate, Mr. Speaker, have already agreed to the conference report as, under the rules, that body was first to consider it and, by a vote of forty-three to thirteen they have ratified the action of the conference committee without the change of a word." (*Cong. Rec.*, Vol. 31, p. 6428.)

The statement of the conferees on the part of the House presented by Mr. Henderson, inter alia, said:

"XII. A change has been made in the bill as agreed upon as to who may be adjudged involuntary bankrupts by including an unincorporated company and corporations engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits. It is believed that such corporations should be subject to the involuntary provisions of this bill. In these times the formation of corporations for these purposes is very common. The great railroad and transportation companies and banks, incorporated under any law, are left to be dealt with by the state creating them. It would lead to much confusion and hardship, and many complications, should we undertake to subject the great railroad and transportation corporations to the provisions of this act. It is believed that they can be better dealt with under other laws." (*Cong. Rec.*, Vol. 31, p. 6427.)

It will be remembered that Mr. Henderson said that the bill as agreed upon was the work of the sub-committee, consisting of Senator Nelson and Mr. Ray. Senator Nelson, in analyzing the bill before the Senate, said:

> "In respect to involuntary bankruptcy, no farmer or wage earner can be put into bankruptcy, no national bank or bank existing under state laws or incorporated banks, but private banks may, and then certain corporations, corporations engaged exclusively in manufacturing and mercantile pursuits, in printing and publishing, can be put into bankruptcy, but no other corporations can. Neither a farmer, nor a wage earner, neither a national bank nor a state bank, can be put into bankruptcy, and no other corporations except the ones I have indicated." (*Cong. Rec.*, Vol. 31, p. 6298.)

This statement was not challenged, though the *Record* shows the conference report, which became our present law, was carefully considered by a very full Senate; nor were there any criticisms of this section of the bill in the House, while other parts were there earnestly debated and sharply criticised.

The House of Representative has recently (February 6th, 1909,) passed a bill (H. R. 21,929) further amending the present law.

Section 3 of this amendatory bill reads as follows:

> "Sec. 3 That sub-division b of Section 4 of said act as so amended be, and the same hereby is, amended so as to read as follows:
>
> "(b) Any natural person, except a wage earner, or a person engaged chiefly in farming or tillage of the soil, any unincorporated company, and any moneyed, business or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act."

In the report accompanying this bill the committee on the judiciary, commenting on this section, said:

> "This section, in substance, substitutes for the words 'and any corporation engaged principally in manufacturing, trading, printing, publishing and mining or mercantile pursuits,' the words 'any moneyed, business or commercial corporation, except a municipal, railroad, insurance or banking corporation'—in short, would enact the rule and express the exception, rather than enact the exception, as the present law did." (Sixtieth Cong., Second Session, H. R. Report 1834, p. 2.)

This action shows that the House clearly understood that the intention of the original law was to restrict the classes of corporations which could be adjudged bankrupts.

A HOTEL CORPORATION CONDUCTING HOTELS IS NOT ENGAGED IN A TRADING OR MERCANTILE PURSUIT WITHIN THE MEANING OF THE BANKRUPTCY ACT.

In re Chesapeake Oyster & Fish Co., 112 Fed., 960; 7 Am. Bankr. Rep., 173.

In re Barton Hotel Co., 12 Am. Bankr. Rep., 335.

United States Hotel Co. v. Niles, 134 Fed., 225; 13 Am. Bankr. Rep., 403.

Gallagher v. Delancey Stables, 158 Fed., 381; 19 Am. Bankr. Rep., 801.

In re Wentworth Lunch Company, 159 Fed., 413; 20 Am. Bankr. Rep., 29.

United States Hotel Company vs. Niles, supra, is directly in point. This case was decided in 1904 by Circuit Judges Lurton, Severns and Richards, sitting as the Circuit Court of Appeals for the Sixth Circuit. Judge Lurton for the Court, delivered a very carefully prepared opinion, which

shows that the question was thoroughly considered, and in which he discussed the meaning of the terms used in Section 4, Sub-section b of the Bankruptcy Act, descriptive of the corporations amenable thereto. The Court held that a hotel corporation conducting hotels did not come under any of the enumerated classes and therefore was not subject to the act. This case has been cited with aproval and as authority several times.

THE TOXAWAY HOTEL COMPANY WAS ENGAGED PRINCIPALLY IN CONDUCTING HOTELS.

During the first season, March to October, 1905, the corporation conducted a series of resort hotels, the business done, based on receipts, amounted to $119,171.36. During the season in 1906 it again conducted the resort hotels, and also about June of that year acquired two small stores located near some of the hotels; the business done during that season, based on receipts, amounted to $127,136.01. The statement of facts does not show how much of this income was derived from the stores, but, for the sake of argument, let us assume that the difference between the receipts of the two seasons was due to the stores; then the income from the stores was $7,964.65—a very liberal estimate as the income of four months from two small country stores, situated in a thinly populated mountain territory, whose combined average stocks were worth about $7,000.00. With this liberal estimate allowed, the stores then produced only six per cent. of the income.

Considered the business done during the season of 1906, the facts show that the corporation conducted—

5 Hotels, capacity.....750 guests.
2 Country Stores, stock in both about...$7,000.00.

That the business of the corporation, as measured by receipts, was—

Hotels.....94 per cent.
Stores..... 6 per cent.

That the corporation employed in—

Hotels.....130 persons.
Stores..... 4 persons.

Does any one believe the corporation relied on the stores as its principal source of income? The corporation did not conduct the stores as a separate enterprise, but as an incident to running these resort hotels, situated far back in a thinly settled part of the mountains. These two little stores were nothing more than comissaries for the benefit of the hotels, their guests and employees, and place of barter with the country people for chickens, eggs, butter and such produce needed by the hotels. Two-thirds to three-fourths of the goods handled by these stores went as supplies to the hotels on orders of the stewards, and the remainder was sold principally to the employees of the corporation, the hotel help; and in this these little stores were incidentally helpful to the hotels, as they afforded oportunities for the hotel help to supply their wants without the demoralization of trips to distant towns.

Can it be seriously contended that the running of these little stores was the principal business of the corporation?

To be subject to the bankruptcy law a corporation must not only be engaged in one of the pursuits enumerated in Section 4, sub-section b, but must be "principally" so engaged, a mere incidental occupation therein will not suffice.

> *Remington on Bankruptcy*, Ed. 1908, Vol. 1, Secs. 85 and 86.

A principal business is that business which is a chief concern, and which is chiefly relied on as a means of making money.

In re Mackey, 110 Fed., 355.
In re Drake, 114 Fed., 229.
Woodburn v. Drake, 120 Fed., 493.
In re Quimby Co., 10 Am. Bankr. Rep., 424.
Philpot v. O'Brien, 11 Am. Bankr. Rep., 205.
Bank v. Matney, 132 Fed., 75.
Rice v. Bordner, 141 Fed., 566.
Zugella v. Int. Mer. Agency, 16 Am. Bankr. Rep.
McNamara v. Helena Coal Co., 5 Am. Bankr. Rep., 48.

In *Woodburn v. Drake, supra*, Judge Boyd, in delivering the opinion of the Circuit Court of Appeal, said:

> "The statute does not apply to such persons only as are engaged solely in farming or tillage of the soil, but exempts from the provisions relating to involuntary bankruptcy all persons who are chiefly so engaged. It does not matter, therefore, if the person may have other business or other interests, if his principal occupation is that of an agriculturalist, if that is the business to which he devotes more largely his time and attention, which he relies upon as a source of income for the support of himself and family, or for the accumulation of wealth, although, as before suggested, he may have other interests or other investments, yet the conclusion must be that his chief business is that of farming or tillage of the soil. The presence of an establishment like the one maintained by Drake on his premises as a store or commissary was of great convenience, to both the landowner and his tenants, croppers, and employees, for it afforded a place from which they could readily obtain necessary supplies. It saved them from the loss of time necessary to go to distant places to make their purchases, and it also provided them an opportunity to procure necessities without ready cash. It was therefore a benefit to both Drake and those employed in cultivating his lands to have his store or comissary where it was. When, upon the testimony, it was found as a fact that Drake was engaged chiefly in

> farming, which view is fully sustained by the testimony, it was the duty of the Court, under the law, to dismiss the petition."

This case has been cited with approval several times, notably in *Bank vs. Matney*, 132 Fed., 75, and in *Re Johnston*, 149 Fed., 868.

United States Hotel Co. vs. Niles, supra, from the Circuit Court of Apeals for the Sixth Circuit, Judge Lurton says:

> "That its principal business shall be trading is required, that if trading be a minor object, wholly incidental to some greater purpose, it is not embraced among the corporations subject to the law."

In *McNamara vs. Helena Coal Co., supra*, Judge Bruce said:

> "In determining whether a corporation may be declared an involuntary bankrupt, the question is not how extensive the company's powers may be, but in what pursuits the corporation is in fact principally engaged; therefore, whether a corporation as an incident to and in connection with its coal mining business and for the convenience of its employees conducts a small supply store, in which is invested only a small portion of its assets, it cannot be considered as principally engaged in conducting the supply store, and is not subject to be adjudged an involuntary bankrupt."

But, the petitioners may say, the hotels were closed the first of October, 1906, and from that date to November 13th, the date of sale of the stores to Jacobs, the corporation was not conducting hotels. It is true the hotels closed for the season on October 1st, 1906, just as all other resort hotels close at the end of the season, and just as they had closed for the preceding season on October 1st, 1905, and the fact that possession was not surrendered until April 20th, 1907, shows

that the corporation did not intend the closing on October 1st, 1906, to be permanent, but only for the season. Evidently the corporation held possession of these hotels with caretakers, who were no doubt constantly engaged in caring for and preparing the furniture, buildings and grounds for the coming season, and other agents were undoubtedly at work, advertising and preparing for the coming season, and the corporation was thus engaged in the hotel business. If the fact that the hotels were closed for the season is to be construed as putting the corporation out of business, with equal force it might be said a manufacturing corporation ceased to be a manufacturing corporation because it discharged its employees and closed its mill or shop for sixty or ninety days for repairs, or because of dull times, although it intended to resume work; or that a mining company which ran a commissary ceased to be a mining company and became a mercantile company because it closed its mines and kept its comissary open on account of labor troubles, or dull times, or for repairs, though the plant was kept in order awaiting resumption.

McNamara v. Helena Coal Co., supra.

Or that a farmer, who incidentally runs a small country store, or commissary, ceases to be a farmer and becomes only a merchant during the winter months, when all farming operations are stopped for the season, awaiting the opening of spring.

Wulburn v. Drake, 120 Fed., 493.

As three-fourths of the business done by these stores was in supplies to the hotels, and the principal part of the remaining fourth was done with the hotel help, when the hotels closed for the season the stores practically closed; indeed, except by inference, there is nothing in the statement of facts to show they did not then actually close, like the hotels, for the season.

The Toxaway Hotel Company contends that the facts conclusively show that it was a corporation organized for the purpose of conducting hotels and that its principal business was conducting hotels and therefore is was not principally engaged in trading or mercantile pursuits, and hence is not amenable to the Bankruptcy Act.

Office Supreme Court, U. S.
FILED.
JAN 17 1910
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

October Term, 1909.

No. 88.

The Toxaway Hotel Company

vs.

J. L. Smathers & Company, et al.

On a Certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

Brief of Julius C. Martin of Counsel for the Creditors.

SUPREME COURT OF THE UNITED STATES.

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On a Certificate From the United States Circuit Court of Appeals For the Fourth Circuit.

BRIEF OF JULIUS C. MARTIN, of Counsel for the Creditors.

STATEMENT OF FACTS.

The statement of facts herein shows that The Toxaway Hotel Company is a corporation organized under the laws of the State of Georgia and that it had its principal place of business in the county of Transylvania, in the State of North Carolina, within six months prior to the filing of the petition in this case. It is stated in the petition for articles of incorporation, that the purpose of the incorporators in forming the corporation was as follows:

"2. The object of their association is pecuniary gain for themselves and associates."

"3. The particular business which they propose to carry on will be to conduct hotels for the accommodation of the public, or individuals; to keep, manage, conduct and carry on the business of running hotels, cottages, inns and restaurants, with their usual and necessary adjuncts, including the running of billiard and pool rooms, bowling alleys, buying and selling liquors and tobacco in all their forms, conducting and leasing news and book stands; baths of all kinds, to conduct livery

stables, operating farm and fish hatcheries; to run omnibuses and transfer lines, together with all other pursuits incident to the operation of hotels."

"4. Petitioners pray the further right to purchase, own, lease or otherwise acquire, lands and buildings, and other property, with the right to dispose of the same."

"5. They further desire the right to borrow money, execute notes, bonds and other evidences of debt, and to secure the same by mortgage."

These privileges were granted the corporation.

In March, 1903, the corporation entered upon the business of conducting hotels in Western North Carolina and continued that business until about the first of October, 1906. Record, p. 3. The operation of the hotels seems to have been uninterrupted during this period except as to two hotels as stated on page 3. In the month of June, 1906, the corporation acquired and began to carry on two country stores in the vicinity of its hotels, and in these stores were kept stocks of general merchandise, such as dry goods, groceries, notions, clothing, hardware, flour, meal, feed, the average stock in each store amounting to from three to four thousand dollars. At these stores the corporation sold goods and merchandise to the general public and in addition to that bought through the stores, as merchant and dealer, supplies for the operation of the hotels. What proportion of the supplies which went into the hotel was bought by the corporation as a merchant is not found as a fact. Neither is the amount of business handled through the stores by the corporation found. The corporation also engaged in buying and selling tan bark and kept a bar at which liquors were sold to the guests of the hotel. About the first of October, 1906, Printed Record, page 3, the corporation ceased to conduct any of its hotels but continued to carry on its stores as a merchant, at least until the 13th day of November, 1906, when it transferred these stores to one, R. V. Jacobs, Record, pages 4 to 6. It appears from the Bill of Sale of its property that at the time of this transfer the corporation owned seven thousand ($7,000) dollars' worth of personal property which it transferred to Jacobs and which consisted of goods, wares and merchandise, furniture and fixtures, live stock, wagons, milk cows, lumber, wagon material,

iron, steel, tools and apparatus used in connection with the blacksmith's shop, feed stuffs and drugs, and such other goods and merchandise as are usually carried in country stores. On January 18th, 1907, three months after this transfer was made, the petition in this cause was filed, seeking to have The Toxaway Hotel Company declared a bankrupt and to have its property distributed, *pro rata*, among its creditors. The petition alleged that The Toxaway Hotel Company was a corporation engaged principally in trading and mercantile pursuits, having its principal place of business in the county of Transylvania, in the State of North Carolina, and that it was indebted to the amount of one thousand ($1,000) dollars to petitioners and other creditors, was insolvent and that within four months prior to the filing of the petition it had committed an act of bankruptcy by transferring its property to Bluthenthal & Brickart, of Atlanta, Georgia, one of its creditors with the intent to prefer said creditor. The corporation denied "that it was engaged in either manufacturing, trading, mining or mercantile pursuits," and alleged that it was not therefore subject to the act of Congress relating to bankruptcy. The matter was referred to a Special Master who took testimony in the case and upon this testimony the case was heard before his Honor the District Judge, who overruled the plea filed by The Toxaway Hotel Company and adjudged the same to be a bankrupt under the facts found from the testimony.

ARGUMENT.

The first question presented by argument of counsel for the hotel company, and in fact about the only question argued, is that a hotel corporation engaged only in the business of conducting hotels is not subject to bankruptcy. While the refutation of this contention is not necessary in this case it seems to me that a hotel corporation is subject to bankruptcy as a corporation engaged in trading or mercantile pursuits.

The section of the Bankruptcy Act to be construed, Sec. 4, sub-division Sec. B. of the Bankruptcy Act of July 1st, 1898, Ch. 541, 30th Stat., 475, reads as follows:

"Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt, and any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unin-

corporated company and any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions, and entitled to the benefits of this Act."

Bouvier's Law Dictionary defines a "trader" as "One whose business is to buy and sell merchandise or *any class of goods* (italics ours) deriving a profit from his dealings."

See also in re Smith, 2 Lowell (U. S.) 69, 22 Fed. Cas. No. 12981; In re Chandler, 1 Lowell (U. S.) 478, 5 Fed. Cas. No. 2591; 4 Nat. Bankr. Reg. 213; *Wakeman v. Hoyt, 28 Fed. Cas. No. 17051.*

Among persons held to be traders under former acts are: Bakers, In re Cocks 5 Fed. Cas. No. 2933; inn keepers, In re Ryan, 21 Fed. Cas. No. 12, 183; livery stable keepers, *In re Odell, 18 Fed. Cas. No. 10, 120.*

Under the present act the following persons, among others, have been held to be traders: Livery stable keepers, In re Morton, 108 Fed. 791; sanatarium company, In re San Gabriel Sanatorium Company, 95 Fed. 271; hotels, In re Barton Hotel Company, 12 Am. Bank 405, District of Columbia; Real Estate Company, 154 Fed. 299; Laundry Company, 132 Fed. 200; Constructing and repairing vessels is mercantile pursuit, 127 Fed. 99, 67 C. C. A. 99; mercantile agency, In re Mercantile Agency, 111 Fed. 152.

This question so far as we have been able to find, has not been presented to this Honorable Court. The keeper of a hotel must be engaged in trading. Certainly so far as his purchases of supplies or leases of property are concerned he trades, buys, purchases. He then changes the form of his supplies to some extent and sells them to his patrons. He also sells the right to occupy and use his premises for the time his patrons remain, and the personal services of the attendants it seems to us should not be allowed such weight as to change the nature of the business into a hiring or letting. In re San Gabriel Sanatorium Company, 95 Fed. 271.

In the case of Wakeman v. Hoyt Fed. case No. 17051, the question was whether the debtor was "a merchant or using the trade of merchandise, or a retailer of merchandise" within the

meaning of the bankruptcy act. Hoyt the debtor was "a manufacturer and vender" of vehicles.

Thompson, Circuit Justice, delivering the opinion of the Court on this question, said: "The first question presented for the opinion of the court is, whether this party is a trader or dealer in merchandise, within the meaning of the act of Congress. We think the meaning to be attached to the words used, is, that when the party is engaged in a kind of business that necessarily requires the purchase of articles for the purpose of carrying on that business, he is a person 'using the trade of merchandise within the intention of the act. The great object is to provide for cases where credit is required. The case of a handicraftsman whose business is confined to the produce of his own labor merely, is different. The words of the act are, 'a merchant or using the trade of merchandise.' If a person is engaged in a business requiring the purchase of articles to be sold again, either in the same, or in an improved state, he must be regarded as 'using the trade of merchandise.' This person was a carriage maker, carrying on an extensive business, in the manufacture and sale of carriages. These may be fairly considered as merchandise; and in the transaction of his business it was necessary for him to contract debts, and use credit. When a person sells the mere produce of his own labor, he is only a seller. His business requires no purchases, and he has no occasion for credit. But Mr. Hoyt, in the transaction of his business, was necessarily both a buyer and a seller. We think, therefore that he is liable to a decree of bankruptcy, if his conduct has been such as to subject him to it."

Was not the Tosaway Hotel Company both a buyer and a seller?

In the case of In re Odell, Federal case No. 10,430, the question was whether or not a man who kept a livery stable, hiring and renting horses and vehicles and also feeding for hire horses of other persons was a merchant or tradesman. In discussing the question Blatchford, District Judge, says:

"It is stated by the bankrupts that they kept horses on livery or boarded horses, that is, kept in their stable horses belonging to other persons and fed such horses with hay, oats, feed and grain, buying such food and receiving pay for the food which such horses consumed. This was as much a sale of the

food as if it had been sold to be taken away from the premises and consumed by the horses of other persons elsewhere. The only difference is that it was sold to be consumed on the premises by the horses of other persons. The purchaser of the food from the bankrupt, paid for it—not indeed by the pound or measure as the bankrupt bought it, but in the amount paid per month or per day for keeping the horses on livery." The bankrupts were held to be merchants or tradesmen.

This decision seems to us to be directly in point, and undoubtedly if the feeding of horses by the day or by the month and furnishing them a place to rest and sleep, is trading, then the feeding of men by the day or by the month and the furnishing them a place to rest and sleep should also be held to be trading.

Counsel for the corporation insist on the view that if the corporation's largest business be one not included in the bankruptcy statute, then the corporation, however much business it might do of the kind and nature mentioned in the statute, would not be subject to bankruptcy. For instance, if a corporation should be engaged in the banking business and in some mercantile pursuit and the volume of its banking business should exceed the volume of its mercantile business the corporation would not be subject to bankruptcy. This contention does not seem to be supported by reason or authority. It seems to us that it can hardly be said that the Congress intended, when a question of this kind should arise, that an examination should be made into all of the affairs of the corporation to ascertain by strict arithmetical rule which business was the larger and then adjudicate accordingly. A more reasonable construction of the statute, it seems to us, would be to say that wherever a corporation, engaged in one or more occupations which would render it subject to bankruptcy if it had no other business, then it should be held to be subject to the bankruptcy act. Of course a mere incidental trading, or buying and selling in an occasional or incidental sort of a way, would not subject the debtor to bankruptcy. But to hold that a person or corporation cannot be adjudged an involuntary bankrupt when he or it were following two different occupations, one included in the bankruptcy statute and the other not, merely because the largest amount of business was done in that occupation not covered by the bankruptcy statute, would

open wide a door through which any number of persons and corporations might escape the effect of the bankruptcy act. In the case of In re San Gabriel Sanatorium Company, 95 Fed. 271, 274, referring to a contention of this kind, the judge said: "The word 'principally,' it seems to me, does not denote the object or end of the pursuit as claimed by the respondent, but is employed here to distinguish a calling, usual occupation, from an isolated single transaction." The charter of The Toxaway Hotel Company authorized it to engage in almost any kind of an occupation. Paragraph 2, referring to the object of the incorporators forming the corporation, says, "The object of their association is pecuniary gain for themselves and their associates." Again, paragraph 4, "Petitioners pray the further right to purchase, own, lease or otherwise acquire lands or buildings and *other property* with the right to dispose of the same," and as is well said by the learned District Judge in his opinion (not reported), "How far this object (that set out in par. 2) has been attained can only be gathered from the sequel. From the evidence in this case it will readily suggest itself that if those interested in this enterprise succeeded in getting money for themselves and their associates, they did so largely at the expense of their creditors." In the case of Wulbern v. Drake, 120 Fed. 303, cited in the brief of the corporation, the following facts are found which distinguish that case from ours: "Drake did not solicit trade outside of those upon his farms, although he sold goods to such persons as applied. That he bought for the store $15,000 or $20,000 worth of goods and supplies a year. That at the time of the assignment there were accounts due on the books of the store to about the amount of $5,000, all of which was due by tenants and croppers except about $300. It was also shown that on many of the plantations in that section it was the custom for the landowner to keep a store or commissary for the purpose of supplying those who worked upon his lands with fertilizers, groceries, and such articles of food and clothing as might be necessary, and that this business was a mere adjunct to the farming operations. The testimony shows further that Drake, for six or eight years previous to the filing of the petition, had borrowed on an average of $2,000 a year from the bank of Marlborough, the money being used in aid of his farming operations, and giving as security therefor liens on his crops, his horses and mules, and

sometimes mortgages on his lands; that his principal income was derived from his farming operations, and that he relied on this as the source from which to obtain the means to maintain and support himself and family." Those facts make an entirely different showing as we contend from the facts in this case. There the debtor engaged in the mercantile business only in an incidental way and expressly for the purpose of enabling him to conduct his farming operations in a satisfactory manner, whereas in this case, as is said by the District Judge, "It was contended in the course of the argument that the stores conducted by the Toxaway Hotel Company were merely incidental to the principal business, that of hotel keeping. This position is palpably untenable, for there is no necessary element of conjunction between a hotel and a store in which general merchandise is kept and sold. It is true it appears that provisions and produce to some extent, were supplied to the hotels from these stores, but no doubt the reasons underlying this transaction was the fact that the stores could exchange goods at a profit for provisions and thus be of advantage to the hotel company. But for this reason the company could have bought the provisions directly from the vendors."

2. As The Toxaway Hotel Company, however, was not only engaged in running hotels and other incidental businesses but was engaged in buying and selling grain, hay, feed, tan bark, and in conducting two general country stores, buying and selling dry goods, groceries and all other articles of goods usually kept in such a store, Record, page 4, we respectfully submit that the learned judge who tried this case in the District Court was plainly right in his conclusion that, "considering the powers with which the company was vested, the various transactions into which it entered, and the nature and character of its business, it was both a trader and a merchant." The argument of counsel for the company admits that the company was a merchant and engaged in mercantile pursuits but rests his contention on the fact, that, as he says, the corporation "was not principally so engaged." It does not appear here what the amount of the purchases were at the stores, what were the sales, nor what proportion of the income of the corporation at its hotels should be credited to the supplies which it acquired from the stores and therefore to the stores instead of the hotels. We respectfully submit that the figures

given in the Record do not prove the contention of the company, that it was only incidentally engaged in trading. It may be, from all that appears the entire amount of the supplies which went to the company's hotels was bought by the company at its stores. It should be noted that the lines of goods dealt in at the stores, were broad enough to completely supply the hotels. The stores carried groceries, flour, meal, meat, produce and other things necessary for the hotels, Record, page 4, and while the amount on hand at any one time does not appear to have been large, there is nothing on the Record to show how much of these supplies were bought by the corporation ostensibly for the store and then transferred to the hotels. Would a corporation be permitted to hold itself out to the world as a merchant, buying in the general market as such, and then when attacked, say, "Oh yes, I bought as a merchant but I sold as a hotel keeper and am therefore not liable to the bankruptcy act, but can prefer such of my creditors as I choose?" The inference in the brief of counsel for the corporation, page 20, that the income of the stores was about eight thousand ($8,000) dollars during the season of 1906, entirely omits the portion of the income to the stores which should be credited to them by reason of the transfer of supplies to the hotels. It does not appear what amount of goods, including groceries, meats, produce, etc., was bought by the stores, nor what amount was sold, nor what amount was transferred to the hotels. The judge of the District Court, upon examination of all testimony, concluded that the company was subject to be adjudged a bankrupt. His decision is presumably correct. The burden is on the appellant to show that the conclusion was erroneous and we respectfully submit that it has failed so to do. Armstrong v. Fernandez, 208 U. S. 324, 330. It is our contention that this corporation was a merchant and trader, "engaged principally in trading or * * * in mercantile pursuits," as well as a hotel keeper.

The two businesses are separate and distinct. There is no connection between them. One is not incidental to the other. Both were occupations or callings in which any person or corporation might engage.

A careful examination of the cases cited in the brief for the corporation will show that none of them are like our case. All are distinguished. Re New York & Westchester Water

Company, 3 Am. Bank. Rep. 508, the corporation involved was a public service corporation, engaged in the business of supplying water.

Re H. J. Quimby Freight F. Company, 10 Am. Bank. Rep. 424, was the case of another public service corporation organized to carry freight and passengers.

In United States Hotel Company v. Niles, 134 Fed. 225, where the opinion was delivered by Judge (Now Justice) Lurton, it was said "that if trading be a minor object wholly incidental to same greater purpose, it is not embraced among the corporations subject to the law."

But who could say that the trading here was "*wholly incidental*" to some greater purpose?

In the Niles case the referee reported that the management of "the hotel gave dinner, supper and breakfast and furnished meals for a consideration: and if liquors were sold in its barroom over the counter to be drunk on the premises, the same being furnished to guests of the hotel and to others coming for that purpose. The hotel also supplied lodgings. The regular rates were 75 cents for each meal and 75 cents for lodging." This comes far short of the business of The Toxaway Hotel Company. Its two stores of general merchandise, dry goods, groceries, provisions, foodstuffs, hardware, buying and selling lumber and tan bark, and its ownership of blacksmith shops, drugs, and all other goods usually carried in country stores, serves to distinguish it widely from any case cited by counsel for The Toxaway Hotel Company.

It is aptly said in Collier on Bankruptcy, "*Each case will necessarily turn on its own facts. It is not to be doubted, however, in this particular, that the law is to be interpreted liberally to effectuate its purpose, that is, that all business corporations, as distinguished from public, quasi-public, money-saving or lending corporations shall be amenable to bankruptcy.*"

Collier on Bankruptcy, 5th Ed., p. 64.

Then again it does not appear in the record in this case, as certified to this court, whether the debts of the creditors set out in the petition were debts contracted by the company as a merchant, for goods sold to its stores, or as a hotel keeper for provisions sold it for its hotels. These matters are important.

See Armstrong v. Fernandez, 208 U. S., 324, 330.

Olive v. Armour Company, C. C. A., 167 Fed. 517, and as the District Judge who had all the testimony before him held that the company was engaged in trading and mercantile pursuits his finding should not be disturbed unless plainly wrong.

3. There is another view of this case, which, we think, justifies the decision of the court below, and that is that the business of the bankrupt, in order to determine the question raised here, must be considered as of the time of committing the alleged act of bankruptcy or filing the petition in the case. The language of the statute, when construed according to the natural meaning of the words, would refer to the occupation of the alleged bankrupt as of the time of filing the petition in the case.

Flickenger v. First Nat. Bank, 76 C. C. A., 132, 135, 145 Fed. 162.

But it has usually been held that the occupation at the time of committing the alleged act of bankruptcy is the test. Such was held in the case just cited.

But in the case of In re Matson, 123 Fed. 743, the matter was gone in to in detail and the Judge who delivered the opinion, referred the question of occupation to the time when he was passing upon the case. In any event at the time of the commission of the alleged act of bankruptcy herein on November 13, 1900, the appellant was engaged exclusively in mercantile pursuits. Its hotels closed October 1st, and its mercantile business was continued till November 13th, following.

JULIUS C. MARTIN,
Attorney for Creditors.

TOXAWAY HOTEL COMPANY *v.* SMATHERS & CO.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 88. Submitted January 18, 1910.—Decided February 21, 1910.

A corporation engaged principally in running hotels is not a corporation engaged principally in trading or mercantile pursuits within the meaning of § 4, subs. *b*, of the Bankruptcy Act of 1898.

Where Congress has not expressly declared a word to have a particular meaning, it will be presumed to have used the word in its well-understood public and judicial meaning, and cases based on a declaration made by Parliament that the word has a certain meaning are not in point in determining the intent of Congress in using the word.

An occupation that is not trading is not a mercantile pursuit.

A corporation not otherwise amenable to the Bankruptcy Act does not become so because it incidentally engages in mercantile pursuit; and so held as to a hotel company which, in addition to inn-keeping in which it was principally engaged, conducted a small store as an incident to its hotel business.

FROM the facts certified it appears that the Toxaway Hotel Company was, in May, 1905, duly incorporated under the laws of Georgia. Among the purposes of the company, as stated in the application for incorporation, were these, "to conduct hotels for the accommodation of the public, . . . to keep, manage, conduct and carry on the business of running hotels, cottages, inns and restaurants, with their usual and necessary adjuncts, including the running of billiard and pool rooms, bowling alleys, buying and selling liquors and tobacco in all their forms, conducting and leasing news and book stands; baths of all kinds, to conduct livery stables, operating farm and fish hatcheries, to run omnibuses and transfer lines, together with all other pursuits incident to the operation of hotels." The company acquired and operated six hotels, situated in a thinly populated part of the mountains of western

North Carolina, having an aggregate capacity of seven hundred and fifty guests. These were carried on from March, 1905, until October, 1906, when an assignment was made. Within four months after such assignment creditors filed a petition seeking to adjudicate the corporation a bankrupt, as having been "engaged principally" in trading and mercantile pursuits. It contested adjudication and averred that it was not a corporation subject to involuntary proceedings, as it had not been principally engaged either in "trading" or "mercantile pursuits," but was a hotel company, and, as such, was not one of the class of corporations specified in the fourth section of the Bankrupt Act, as amended.

The material facts as to the character of the business done by this corporation are these:

"That the business done by the corporation at these hotels during the first season, from March to October, 1905, as shown by the receipts, amounted to $119,171.36; and that done during the second season, from January 1st to October 1st, 1906, as shown by the receipts, amounted to $127,136.01.

"That during 1905 and until June, 1906, the said corporation did no other business than conducting hotels, excepting the cultivation of a small farm connected with one of the hotels, for the purpose of supplying vegetables and garden truck.

"That in June, 1906, said corporation acquired and began conducting two country stores—one located at Toxaway Inn and the other at Lake Sapphire, and Fairfield Inn. In these stores were kept stocks of general merchandise, such as is usually carried in country stores, to wit, dry goods, groceries, notions, hats, caps, clothing, a small assortment of hardware, flour, meal, meat, feed, etc., the average value of each stock being from three to four thousand dollars.

"The said hotels were located in a thinly settled section of the mountains of North Carolina, quite a distance from any town; that the stores furnished the hotels from their stocks, and, also, with such produce and other things necessary for

the hotels as came into the stores, and they, also sold goods and merchandise to people generally; and, also, bought and sold some tanbark. That from two-thirds to three-fourths of the goods handled by these stores went as supplies to the hotels on orders from the stewards of the hotels, and the remainder were sold generally, principally to employés of the corporation, and also to the people at large. That the business of the hotels and the stores was kept without separation in one set of books. The corporation, also kept a bar in the Toxaway Inn, at which liquors were sold exclusively to the guests, and had a number of boats and launches on the lakes at Toxaway Inn and at Fairfield, which it hired to patrons when called for.

"That said corporation employed about 130 persons in and about the hotels, and four persons in and about the stores."

Upon these facts the bankrupt court adjudicated the corporation bankrupt. An appeal was allowed to the Circuit Court of Appeals, and the question certified as to whether, upon the facts stated, this hotel company is subject to the provisions of the Bankrupt Act and liable to be adjudicated a bankrupt.

Mr. T. F. Davidson, *Mr. Louis M. Bourne*, *Mr. Haywood Parker*, *Mr. John M. Slaton*, *Mr. Ben Z. Phillips*, for the Toxaway Hotel Company:

The facts show that the Toxaway Hotel Company was a corporation whose principal business was to conduct hotels which is neither a manufacturing, trading, printing, publishing, mining, or mercantile pursuit, and therefore under § 4, subd. *b* is not subject to the bankruptcy law.

The present bankruptcy law has restricted the corporations against whom proceedings can be taken, and many corporations which were in the purview of the law of 1867 are not amenable to the present law. While in *Re San Gabriel Sanitorium Co.*, 95 Fed. Rep. 271, a sanitorium company was held subject to the bankruptcy law—that case has never been followed but has been disapproved. See *Re Cameron Ins. Company*, 96 Fed. Rep. 756; and *Re N. Y. & Westchester Water*

Co., 3 Am. B. Rep. 508; aff'd *sub. nom.*, *Re Morris*, 102 Fed. Rep. 1004, which are the two leading cases on the question.

Following the reasoning of these cases, and in the twenty-six cases cited courts have held the corporations under consideration not amenable to the bankruptcy law:

Massachusetts: *Re H. J. Quimby Freight F. Co.*, 10 Am. B. Rep. 508; *Re N. Y. Building & Loan Co.*, 127 Fed. Rep. 471; *Re N. Y. & N. J. Ice Lines*, 14 Am. B. Rep. 61.

New Jersey: *Re Tontine Surety Co.*, 8 Am. B. Rep. 421.

Pennsylvania: *Re Oriental Society*, 5 Am. B. Rep. 219; *Re Woodside Coal Co.*, 5 Am. B. Rep. 186; *Re Keystone Coal Co.*, 6 Am. B. Rep. 377; *Re Phil & Lewes Co.*, 7 Am. B. Rep. 707; *First Nat. Bank* v. *Wyoming*, 14 Am. B. Rep. 448; *Gallagher* v. *Delancey Stables*, 19 Am. B. Rep. 801.

Virginia: *Re McNichol Const. Co.*, 14 Am. B. Rep. 188.

Georgia: *Re Fulton Club*, 113 Fed. Rep. 997.

Alabama: *McNamara* v. *Helena Coal Co.*, 5 Am. B. Rep. 48.

Texas: *Re Bay City Irrigation Co.*, 14 Am. B. Rep. 370.

Missouri: *Re Cameron Town Insurance Co.*, 2 Am. B. Rep. 372; *Re Chicago & Joplin Co.*, 13 Am. B. Rep. 712.

Illinois: *Re Snyder & Johnson Co.*, 13 Am. B. Rep. 325.

Michigan: *Re Toledo Cement Co.*, 19 Am. B. Rep. 117.

Wisconsin: *Re White Star Laundry Co.*, 9 Am. B. Rep. 30.

Colorado: *Re Elk Park M. & Mining Co.*, 4 Am. B. Rep. 131; *Re Chesapeake Fish & Oyster Co.*, 7 Am. B. Rep. 173.

Arizona: *Re Min. & Ar. Construction Co.*, 60 Pac. Rep. 881.

California: *Re Pacific Warehouse Co.*, 10 Am. B. Rep. 474; *Herron Co.* v. *Superior Court*, 68 Pac. Rep. 814.

The Circuit Court of Appeals in eight circuits have passed on the question in the following eighteen cases, and all, with one exception (that for the Eighth Circuit), have given a similar interpretation to the language of the act.

First Circuit: *Philpot* v. *O'Brien*, 11 Am. B. Rep. 205; *White Mountain Paper Co.* v. *Morse et al.*, 127 Fed. Rep. 643; *Burdick* v. *Dillon*, 144 Fed. Rep. 737.

Second Circuit: *Re Morris*, 102 Fed. Rep. 1004; *Re N. Y.*

& *N. J. Ice Co.*, 16 Am. B. Rep. 832; *Re Kingston Realty Co.*, 19 Am. B. Rep. 845; *Altonwood Co.* v. *Gwynne*, 20 Am. B. Rep. 31; *Re Wentworth Lunch Co.*, 20 Am. B. Rep. 29; *Re Marine C. & D. Dock Co.*, 130 Fed. Rep. 446.

Third Circuit: *Re Zugella & Int. M. Agency*, 16 Am. B. Rep. 67; *Hall & Kaul* v. *Friday*, 19 Am. B. Rep. 841.

Fourth Circuit: *Butt* v. *McNichol Const. Co.*, 14 Am. B. Rep. 188.

Sixth Circuit: *Columbia Iron W.* v. *Nat. Lead Co.*, 62 C. C. A. 99; *United States Hotel Co.* v. *Niles*, 13 Am. B. Rep. 403, reversing the District Court, and holding that conducting a hotel is not a trading pursuit.

Seventh Circuit: *Re Surety Guaranty Trust Co.*, 9 Am. B. Rep. 129; *Re Parmlee Library*, 9 Am. B. Rep. 568; *Re E. T. Hill Co.*, 17 Am. B. Rep. 517.

Eighth Circuit: *Re First Nat. Bank of Belle Fouche*, 152 Fed. Rep. 64.

Congress did not so amend as to include water companies, insurance companies, theatrical companies, restaurant companies, saloon companies, social clubs, carrier companies, companies buying and selling stocks and bonds, or laundry companies, all of which had been decided not to be within the classes enumerated by the act, and therefore not amenable to bankruptcy; and this, too, after the very general circulation and discussion of the proposed amendments as shown above by the report of the judiciary committee. While this court may think it advisable that corporations like the one here in question should be brought within the scope of the bankruptcy act, it must be guided by what Congress has said, and not by its own view of public policy. *Re Quimby Freight Co., supra*, and for history of act in Congress, see Cong. Rec., 1897, Vol. 30, pp. 602, 606; Cong. Rec., 1898, Vol. 31, p. 1779, and same vol., pp. 1939, 6298, 6427, 6428.

The House of Representatives on February 6, 1909, passed a bill, H. R. 21,929, further amending the present law, and which shows that the House clearly understood that the in-

tention of the original law was to restrict the classes of corporations which could be adjudged bankrupts. Sixtieth Cong., 2d Sess., H. R. Report, 1834, p. 2.

A hotel corporation conducting hotels is not engaged in a trading or mercantile pursuit within the meaning of the bankruptcy act. *Re Chesapeake Oyster & Fish Co.*, 112 Fed. Rep. 960; *Re Barton Hotel Co.*, 12 Am. B. Rep. 335; *United States Hotel Co.* v. *Niles*, 134 Fed. Rep. 225; *Gallagher* v. *Delancey Stables*, 158 Fed. Rep. 381; *Re Wentworth Lunch Company*, 159 Fed. Rep. 413.

To be subject to the bankruptcy law a corporation must not only be engaged in one of the pursuits enumerated in § 4, subsection *b*, but must be "principally" so engaged, a mere incidental occupation therein will not suffice. 1 Remington on Bankruptcy, ed. 1908, § 85; *Re Mackey*, 110 Fed. Rep. 355; *Re Drake*, 114 Fed. Rep. 229; *Woodburn* v. *Drake*, 120 Fed. Rep. 493; *Re Quimby Co.*, 10 Am. B. Rep. 424; *Philpot* v. *O'Brien*, 11 Am. B. Rep. 205; *Bank* v. *Matney*, 132 Fed. Rep. 75; *Rice* v. *Bordner*, 141 Fed. Rep. 566; *Zugella* v. *Int. Mer. Agency*, 16 Am. B. Rep. 67; *McNamara* v. *Helena Coal Co.*, 5 Am. B. Rep. 48.

Mr. Julius C. Martin for J. L. Smathers & Co.:

A hotel corporation is subject to bankruptcy as a corporation engaged in trading or mercantile pursuits under § 4, subd. *b* of the act of 1898.

A trader is "one whose business is to buy and sell merchandise or any class of goods deriving a profit from his dealings." Bouvier's Law Dict.; *Re Smith*, 2 Lowell, 69; *S. C.*, 22 Fed. Cas. No. 12,981; *Re Chandler*, 1 Lowell, 478; *S. C.*, 5 Fed. Cas. No. 2,591; 4 Nat. Bankr. Reg. 213; *Wakeman* v. *Hoyt*, 28 Fed. Cas. No. 17,051.

Among persons held to be traders under former acts are: Bakers, *Re Cocks*, 5 Fed. Cas. No. 2,933; inn-keepers, *Re Ryan*, 21 Fed. Cas. No. 12,183; livery stable keepers, *Re Odell*, 18 Fed. Cas. No. 10,426.

Under the present act the following persons, among others, have been held to be traders: Livery stable keepers, *Re Morton*, 108 Fed. Rep. 791; Sanitarium Company, *Re San Gabriel Sanatorium Company*, 95 Fed. Rep. 271; *Re Barton Hotel Company*, 12 Am. B. Rep. 405; Real Estate Company, 154 Fed. Rep. 299; Laundry Company, 132 Fed. Rep. 266. Constructing and repairing vessels is a mercantile pursuit, see 127 Fed. Rep. 99; Mercantile Agency, *Re Mercantile Agency*, 111 Fed. Rep. 152.

The Toxaway Hotel Company was both a buyer and a seller. *Re Odell*, Fed. Cas. No. 10,426.

Each case will necessarily turn on its own facts. It is not to be doubted, however, in this particular, that the law is to be interpreted liberally to effectuate its purpose, that is, that all business corporations, as distinguished from public, quasi-public, money-saving or lending corporations, shall be amenable to bankruptcy. Collier on Bankruptcy, 5th ed., p. 64.

It does not appear in the record in this case, whether the debts of the creditors set out in the petition were debts contracted by the company as a merchant, for goods sold to its stores, or as a hotel keeper for provisions sold it for its hotels. These matters are important. See *Armstrong* v. *Fernandez*, 208 U. S. 324, 330; *Olive* v. *Armour Company*, 167 Fed. Rep. 517. The language of the statute, when construed according to the natural meaning of the words, would refer to the occupation of the alleged bankrupt as of the time of filing the petition in the case. *Flickenger* v. *First Nat. Bank*, 145 Fed. Rep. 162. The occupation at the time of committing the alleged act of bankruptcy is the test. At that time (November) the Hotel Company was engaged exclusively in mercantile business, as the hotels were closed. *Re Matson*, 123 Fed. Rep. 743.

Mr. Justice Lurton, after stating the facts as above, delivered the opinion of the court.

The act of 1867 applied to "all moneyed business or com-

mercial corporations and joint-stock companies." The present act applies only to such corporations as are "principally engaged" in certain enumerated kinds of business. That of inn-keeping, though as old as civilization, is not specifically enumerated. Unless, therefore, a corporation engaged in the business of hotel keeping is embraced within one or the other of those which are enumerated, it is not liable to an involuntary adjudication.

The contention is that this was a corporation principally engaged in "trading" or "mercantile pursuits."

For the present we shall only deal with the bare question as to whether inn-keeping is within a proper definition of "trading" or "mercantile pursuits." The keeping of a bar, cigar and news stand are obviously but ordinary incidents to the main business when conducted within the inn, and primarily for the convenience of guests. The maintenance of a livery and of small pleasure boats for the accommodation of guests may also be accepted as merely incidental to that class of hotels called resorts. The significance of the fact that this company did, in addition to the ordinary business of hotel keeping, engage to a certain extent in an outside trading or mercantile business will later be considered.

Having thus narrowed the question, we must answer that a corporation engaged principally in running hotels is not a corporation engaged principally in "trading" or "mercantile pursuits." An innkeeper is one who maintains a house for the entertainment of strangers, for a reasonable compensation. To secure this compensation he is given a lien upon the property of his guests within the inn. For this property he is under liability much like that of a common carrier. So long as he has room, he must receive all who may apply and are fit persons. He may not discriminate. To say that he buys and sells articles of food and drink is only true in a limited sense. Such articles are not bought to be sold, nor are they sold again, as in ordinary commerce. They are bought to be served as food or drink, and the price includes

rent, service, heat, light, etc. To say that such a business is that of a "trader" or a "mercantile pursuit," is giving those words an elasticity of meaning not according to common usage.

Until changed by a Parliamentary declaration in 1825, Act 6, George IV, c. 16, defining the persons included under the term "trader," as used in the bankrupt and insolvency acts, it was held that an innkeeper was not a tradesman. *Newton* v. *Trigg*, 1 Showers, 96; *Luton* v. *Bigg*, Skinner, 276, 291; *Willitt* v. *Thomas*, 2 Chitty, 691.

In *Luton* v. *Bigg* it was said of an innkeeper: "He is in the nature of a public person, and his house and occupation a thing of necessity, and his gain does not arise from the victuals which he sells, but from his furniture and attendance."

In *Newton* v. *Trigg*, cited above, it was said: "An innkeeper cannot get his own prices, but is bound to a reasonable price. A tradesman may sell to whom he pleases. An innkeeper cannot refuse his guest. He doth not get by buying and selling. He gets by the price and hire of his lodging, also by the profit on the ale of kitchen. The profits from his stables do not arise from hay alone, but from the standing."

Congress having never by express legislation declared an innkeeper a "trader," it must be presumed to have used the word in its well-understood public and judicial meaning, and cases based upon a Parliamentary meaning are not in point. See *Hall* v. *Cooley*, Fed. Case No. 5,928, and *In re Cote*, Fed. Case No. 3,267, where Judge Lowell, referring to the declaratory act giving a list of occupations which should constitute trading, said that Congress "had not defined a tradesman and the question was therefore addressed to the common usage of this country and to the judge's knowledge of his own language." He defined a tradesman "as substantially the same as shopkeeper." In the case styled *In re Smith*, Fed. Case No. 12,981, the same learned judge adopted the definition of Bouvier, who defines a tradesman as "one who makes it his business to buy merchandise or goods or chattels to sell again

for the purpose of making a profit." If the occupation of inn-keeping is not "trading," it is not a "mercantile pursuit," for little more than a broader significance can be given to that term than to "trading." It is, in fact, trading in the larger sense. "Mercantile" is defined "as having to do with trade or commerce; of or pertaining to merchants, or the traffic carried on by merchants" (Century Dictionary). To be principally engaged in a mercantile pursuit one must be carrying on commerce in some of its branches. See *In re Cameron Insurance Co.*, 96 Fed. Rep. 756; Loveland on Bankruptcy, § 48; *In re New York & W. Water Co.*, 98 Fed. Rep. 711. The conclusion we reach accords with that announced by the Sixth Circuit Court of Appeals in *In re United States Hotel Co.*, 134 Fed. Rep. 225, where the matter is considered and the cases bearing upon the subject reviewed.

But it is said that although this was a hotel company and engaged in doing the business of an innkeeper, it was in fact principally engaged in trading and mercantile pursuits. If so, that is the end of the matter, for liability under the act is dependent upon what it was actually doing rather than upon what it was organized to do or professed to be doing. See *Friday* v. *Hall & Kaul Co.*, just decided.

It may have been engaged in doing two distinct kinds of business. But unless this corporation was "engaged principally" in mercantile pursuits, it was not amenable to the act. "Engaged principally" are plain words of no ambiguous meaning. They need no construction. Amenability to the statute must turn upon the facts of the case where, as here, the same corporation was engaged in "mercantile pursuits" in addition to inn-keeping. There is no way to settle whether it was "engaged principally" in the one or the other but by a comparison of the two. When we do this it is easy to see that the mercantile business which it did was of minor character and was largely an incident to the location of the hotels of the company in a thinly settled mountainous region. The stores were country stores—that is, stores dealing in a

great variety of ordinary necessities. From two-thirds to three-fourths of the goods handled were used in the running of the hotels, upon order of the stewards. Much of the remainder were sold to the employés, and the rest to customers at large, who paid in money or bartered country supplies for goods. The average stocks carried were from three to four thousand dollars in value. They were in a large sense hotel commissaries. The business was done but for one season. If we compare the volume of that done by the innkeeping business proper with that done by the stores the minor character of the latter is plain. The hotels employed one hundred and thirty persons; the two stores, four. The receipts of the hotel business plus the mercantile business—for all were kept upon one set of books—for the year 1906 were $127,136.01. The receipts for the previous year, when no stores were operated, were $119,171.36. The volume of mercantile business must have been small compared to the volume of the hotel business proper. That the company was "engaged principally" in the hotel business proper is plain. It was, therefore, not amenable to the act.

The answer to the interrogatory of the Circuit Court of Appeals must, therefore, be in the negative.